No. 16,498

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC NATURAL GAS CO.,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PACIFIC NORTHWEST PIPELINE CORPORATION,
Intervener.

Brief for Intervener, Pacific Northwest Pipeline Corporation

On Petition to Review an Order of the Federal Power Commission

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STATEMENT OF THE CASE

1. Proceedings Below.

Misconceiving the law because of an erroneous decision by the Court of Appeals for the District of Columbia Circuit, eighteen moving parties filed nine motions with the Federal Power Commission to reject revised tariff sheets filed by Pacific Northwest Pipeline Corporation pursuant to section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d). After the Supreme Court reversed the

Court of Appeals, the Commission denied the motions. R. 1372. Seventeen of the movants have made no further objection to the Commission's order. One of them, Pacific Natural Gas Co., brings the order here for review.

Pacific Northwest is a "natural-gas company", that is, it sells natural gas in interstate commerce for resale. Act § 2(6), 15 U.S.C. 717a(6). Under a certificate issued by the Commission in 1954, Pacific Northwest built a pipeline through which it transmits gas from the San Juan Basin in Colorado and New Mexico, and other fields in Colorado and Wyoming, and sells it in Colorado, Utah, Wyoming, Idaho, Oregon and Washington to local distributing companies (including Pacific Natural), municipalities and others. R. 4, 5; *Northwest Natural Gas Co.,* CCH Util. Law Rep. ¶ 9416, 6 PUR 3d 403.

The Act requires Pacific Northwest to keep on file with the Commission tariff schedules showing all its rates. § 4(c), 15 U.S.C. 717c(c). July 29, 1957, as permitted by its service agreements with its customers, *infra* pp. 4-6, Pacific Northwest established new schedules increasing its rates, and August 6, 1957, as required by § 4(d) of the Act, it filed the new schedules with the Commission. R. 434-687. They were estimated to involve increases of about $5,500,000 a year, R. 817, of which only a small fraction applied to sales of industrial gas[1] to Pacific Natural, the petitioner here. Pet. Br. 15-16.

The industrial rates became effective September 1, 1957, as specified by Pacific Northwest. Act § 4(e), R. 16, 437. September 4, 1957 the Commission suspended, as § 4(e) empowers it to do, all of the revised rate schedules except those for industrial gas. R. 817, 818. No one, including the petitioner here, objected that this order should also have suspended the industrial rate schedules, or that the Commission should have rejected the industrial rate

1. Like petitioner, we use the term "industrial gas" as shorthand for the phrase in § 4(e), proviso, "natural gas [sold] for resale for industrial use only."

schedules, or refused to permit them to become effective. This order initiated the proceeding, Docket No. G-13202, out of which eventuated the order now brought here for review.

November 21, 1957 the Court of Appeals, District of Columbia Circuit, startled the gas industry by its decision in the *"Memphis"* case. *Memphis Light, Gas & Water Div. v. FPC,* 250 F.2d 402. The Court held that a natural-gas company could not make or file an increased rate without its purchaser's consent to the precise level of the new rate, and in the absence of such agreement the Commission had no jurisdiction to receive or consider the new rate schedules.

Numerous motions were then filed by distributing companies and State Commissions in this and other proceedings[2] to reject revised rate schedules on which proceedings were pending, to prevent them from becoming effective and to order refunds and dismiss the proceedings. In the present case, such motions were filed by three State Commissions,[3] four distributing companies, including the petitioner here,[4] and ten industrial users of Pacific Northwest-supplied gas.[5] Each of these motions, including that of the petitioner here, relied exclusively on the *Memphis* case. But the Commission, as § 4(e) requires it to do when the proceed-

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2. See, e.g., El Paso Natural Gas Company, 19 F.P.C. 154, *affirmed sub nom.* Nevada Natural Gas Pipe Line Co. v. FPC, 267 F.2d 405.

3. Washington Public Service Commission, R. 1003; Public Utility Commissioner of Oregon, R. 1085; Public Service Commission of Utah, R. 1132.

4. Mountain Fuel Supply Company, R. 1015, Public Service Company of Colorado, R. 1052; Pacific Natural Gas Co., R. 1061; Washington Natural Gas Company, R. 1154.

5. Coos Bay Pulp Corp., Crown Zellerbach Corporation, Hooker Electrochemical Company, Longview Fibre Company, Pacific Northwest Alloys, Inc., Pennsalt Chemicals Corporation, Puget Sound Pulp and Timber Co., Scott Paper Company, Seattle Steam Corporation, and Weyerhaeuser Timber Company, R. 1273. The Commission also treated certain statements in the petition for leave to intervene of Kaiser Aluminum & Chemical Corporation, R. 849, as a motion to reject, and denied it along with the rest. R. 1372-73.

ing has not been completed within the suspension period, permitted the nonindustrial rate schedules to become effective on February 5, 1958, subject to refund. R. 1142.

The Supreme Court granted three writs of certiorari in the *Memphis* case, 355 U.S. 938, and on December 8, 1958, reversed the Court of Appeals, holding that in the case of a service agreement such as Pacific Northwest has with its customers, including the petitioner here, the natural-gas company is fully justified in establishing and filing new rate schedules. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.,* 358 U.S. 103.

The Commission thereafter denied all the motions to reject. R. 1372. Only the present petitioner, Pacific Natural, filed a petition for rehearing, R. 1375, as a prerequisite to court review. Act § 19(a), 15 U.S.C. 717r(a).

2. The Service Agreements.

The record discloses that Pacific Northwest and Pacific Natural have eight effective service agreements, only one of which covers industrial gas.[6] In addition, Pacific Northwest has eight municipality and thirteen distributing company customers, R. 45-47, with whom it has more than seventy presently effective service agreements covering distribution system, industrial and other forms of service. R. 49-433.

Every one of these several-score agreements, whether for industrial gas or other gas, and including those with petitioner, contains precisely the same provisions with respect to the making and filing by Pacific Northwest of rate schedule changes. Commission

6. R. 309, 313, 317, 321, 325, 329, 333, 344. The industrial service agreement attached to Pacific Natural's Motion to Reject, R. 1061, 1067, and referred to in its brief here, Pet. Br. 5, was not, as noted by the Commission in its Order Denying Reconsideration, R. 1409, 1410n, an effective filed service agreement at the time the proceedings were before the Commission. However, as the Commission also noted, its provisions in regard to rate schedule changes are the same as those of the effective agreement, R. 344, 345.

regulations require that the form of service agreement be filed with the tariff, 18 C.F.R. 154.34, and Pacific Northwest's service agreement forms have never been altered since the tariff was originally filed in 1956. R. 36, 39. There were only two of them,[7] and each contains the following paragraph, R. 37, 39:

> "Buyer agrees to pay Seller for all natural gas service rendered under the terms of this Agreement in accordance with Seller's Rate Schedule ..... as filed with the Federal Power Commission, and as such rate schedule may be amended or superseded from time to time. This Agreement shall be subject to the provisions of such rate schedule and the General Terms and Conditions applicable thereto on file with the Federal Power Commission and effective from time to time, which by this reference are incorporated herein and made a part hereof."[8]

The General Terms and Conditions referred to in the Service Agreements contain, and have always contained, the following paragraph, R. 34:

> "Seller's rates, charges, classifications and services as set forth in this Tariff are subject to regulation by the Federal Power Commission under the Natural Gas Act. Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act such new rate schedules and changes in its existing effective Tariff as Seller may find necessary from time to time to assure Seller just and reasonable rates and charges as well as a rate of return sufficient to service the Seller's debt, attract capital, insure expansion and provide adequate natural gas service to all Seller's customers. Without in any way limiting the generality of the foregoing, Seller shall have the right to file new rate schedules fairly and appropriately reflecting changes in the rates and charges paid by Seller for natural

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7. A third form containing the same provisions was added in 1957. R. 42.

8. That each of the agreements between Pacific Northwest and petitioner Pacific Natural contains this provision may be seen by consulting the agreements themselves, at R. 311, 315, 319, 323, 327, 331, 335, 345.

gas. Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission."

On the basis of these contractual provisions, the Commission held (and all of Pacific Northwest's customers except the present petitioner apparently agree) that "Pacific Northwest's reservation of the right to change rates and to file such changes with the Commission was complete and unequivocal." R. 1411.

SUMMARY OF THE ARGUMENT

1. a. In the *Mobile* case, 350 U.S. 332, it was held that a seller of gas cannot file increased rates where it has contracted not to do so. In *Memphis,* 358 U.S. 103, the Supreme Court made it clear that this rule applies only to a fixed rate contract, and does not affect the usual tariff-and-service agreement arrangements, which leave the seller free to fix and file new rates.

b. The Pacific Northwest service agreements are not fixed rate contracts, hence the rule of the *Mobile* case does not apply. The language of the Pacific Northwest agreements was drawn in the light of the *Mobile* case, and is indistinguishable from that involved in the *Memphis* case. Like the agreements in *Memphis,* it appears in a form attached to a tariff as required by the Commission's regulations, and clearly reserves to Pacific Northwest the right to change its rates.

c. Petitioner refers to a sentence in the General Terms and Conditions on file with the Commission, which reaffirms in the buyer "the right to protest any such new rate schedules and changes before the Federal Power Commission," claiming that it is inconsistent with the seller's right to change its rates. *If* the regulation were inconsistent with the agreement, it would be inapplicable and inoperative. But when reasonably interpreted, it is not inconsistent. All that it means is that buyer does not waive its rights under the statute to participate in the proceedings involving the justness and reasonableness of the new rates. A contract to pay

whatever price the seller may fix for its purchasers generally is valid. Even if the price clause of the service agreement were invalid, the seller's right to file rate changes would stand. Petitioner's present position on the "right to protest" clause is an afterthought. Prior to the motion to reject, it construed the clause to mean exactly what it says. El Paso Natural Gas Company's service agreements containing such a provision were approved by the Court of Appeals as *Memphis*-type service agreements.

2. The Commission found that these were not intended to be fixed-rate contracts. That finding is supported by the language of the agreements, by the meaning accepted by all of Pacific Northwest's other purchasers, and by the general understanding of the industry. Only the present petitioner maintains a contrary position; and even petitioner itself did not make any such claim until after the decision by the Court of Appeals in *Memphis* on November 21, 1957. As the Supreme Court held in *Memphis,* decision of this question is a matter "peculiarly within the area of the Commission's special competence." 358 U.S. 112. There is no contrary evidence in the record, and the finding of the Commission is conclusive. Act § 19(b), 15 U.S.C. 717r(b).

3. The petitioner's constitutional arguments are without merit.

a. Petitioner's constitutional claim is limited to the proposition that Congressional failure to empower the Commission to suspend industrial rates and order refunds with respect to them "permits the taking of petitioner's property without due process of law," because in the interim between rate filing and final order, it may pay more for gas than the rate the Commission may ultimately fix. This obligation, however, is rooted in the contract, not the Act; the Act does not affect the contractual freedom of buyer and Seller to fix rates by contract; Congress merely refrained from changing the existing contractual situation. Refusal to regulate is not a denial of due process.

Petitioner assumes that any rate except the one ultimately fixed by the Commission is unjust and unreasonable, and therefore

unlawful. But rates may be just and reasonable even though the Commission later decides to decrease them, for the Commission may reduce *a* reasonable rate to what in its judgment is *"the lowest* reasonable rate." But the filed rate, unless and until decreased, is not merely a lawful rate, but the only lawful rate.

Petitioner assumes that before the Act, a purchaser had a right to reparations for unreasonable rates, and that its remedy was abolished by the Act. But no such right or remedy in fact existed. Even had the Act abolished a preexisting right, it deprived petitioner of nothing since petitioner's agreements were made long after the Act was adopted. There is no vested right in any particular rule of law, and for Congress to change the law prospectively does not deny due process.

Nothing done by Congress, or by the Commission, takes anything from petitioner, and the Fifth Amendment restrains only action by the Federal Government. A natural gas company can raise any rate, industrial or otherwise, without customer consent, because that is a normal right of all public utilities (when there is no contractual barrier), and the service agreements in this case specifically reserve and confirm that right to the seller. No "taking" is involved in holding petitioner to its agreement. Petitioner's argument that it, being a regulated utility, is entitled to due process protection, is irrelevant since it is exempt from the Natural Gas Act and not subject to any federal regulation.

In summary, the reason that the seller may increase its rates is that petitioner agreed that it might. The failure, if any there was, to afford petitioner the "protection" it now claims was not a failure of Congress in writing the Natural Gas Act, but a failure of petitioner to contract for its gas supply on a fixed rate basis.

b. The Natural Gas Act has withstood repeated constitutional attack since its passage in 1938. The Supreme Court and the Courts of Appeals have each time held it valid. The Supreme Court in the *Memphis* case (wherein no claim of unconstitutionality was made) considered the provisions respecting nonsuspendible indus-

trial rates as valid, particularly where, as here, the distributing company (petitioner) has a contractual right to pass on pipeline rate increases to its own customers.

c. Constitutional arguments have no place in the case. The record shows that the petitioner will not itself be required to bear the cost of any price increases established by Pacific Northwest, but will recoup from its own customers all of such increases. In every instance but one escalator clauses so provide, and in the remaining case it can be done with the consent of the Washington Public Service Commission. One who is not himself harmed by the operation of a statute will not be heard to claim that it is unconstitutional. The constitutional arguments are irrelevant to the disposition of the case, for even if they were upheld, the result would not be affected. If the *contractual* provisions for rate schedule changes were invalid, the result would be a binding contract for the purchase and sale of gas with no price term, and Pacific Northwest would have its right to make rate changes, which it must then file under § 4(d), subject to Commission review under § 4(e). Even if the *statutory* provisions were held invalid, no greater right to protest would be afforded to petitioner, no power would exist to suspend an industrial rate or to order reparations, since no statutory authority exists to do either. Therefore, the relief requested by petitioner could in no event be granted.

ARGUMENT

1. The Service Agreements Are Typical "Memphis" Type Agreements, Plainly Reserving and Confirming to Pacific Northwest the Right to Make and File Rate Schedule Changes.

a. The Mobile and Memphis Cases.

In the *Mobile* case, the Supreme Court held that the Natural Gas Act did not abrogate rate contracts, but only made them subject to the requirement of filing, and to the jurisdiction of the Commission to change them under § 5(a). Section 4(d) did not grant to the seller the power to change his contract, but merely

prohibited him from doing so without notice to the Commission. Therefore, if a buyer and seller had contracted for gas service at a fixed rate for a term, nothing in the Act empowered the seller to change the rate. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332, 338-40, 342-43.

The Court of Appeals in the *Memphis* case "misconceived the import of [the] decision in *Mobile.*" 358 U.S. at 109. It held that under *Mobile,* the seller could never change the rate, whether set forth in a special contract or a general tariff, unless the buyer agreed to the precise level of the new rate, and that a contractual consent by the buyer to the seller's filing of new rates was not enough. The true rule, as the Supreme Court held in the *Memphis* case, is that the seller may change the rate and file it under § 4(d) **unless he has agreed by contract not to do so.** 358 U.S. 103, 111, 112-13. What is needed, therefore, to avoid the *Mobile* result is **not** an agreement to a specific new rate, but merely the absence of any agreement that **no** new rate will be filed.

The result of the *Mobile* and *Memphis* cases is this:

(1) Where a natural gas company agrees with its buyer that it will furnish service at a fixed rate for the entire term of the contract, the agreement is valid and binding unless the Commission finds in a § 5(a) proceeding that the rate is unreasonable; and the seller cannot file changed rates applicable to that buyer under § 4(d).

(2) Where, however, the natural gas company agrees to furnish service at the filed rate, this agreement is also valid and binding, and the seller retains the right to change its rates by establishing new schedules and filing them under § 4(d), subject to the Commission's option to review them, with or without suspension, under § 4(e).

b. Interpretation of the Present Agreements in the Light of Memphis and Mobile.

The agreements here involved contain a provision reserving and confirming to Pacific Northwest its right to make and file rate

schedule changes, and another is incorporated by reference. The latter, paragraph 10 of the General Terms and Conditions of Pacific Northwest's Tariff, appears at R. 34, is quoted twice by petitioner in its brief, Pet. Br. 6, 8-9, and is also quoted *supra* pp. 5-6.

The provision in the service agreement itself is quoted at Pet. Br. 6,[9] and *supra* p. 5. It will prove helpful not only to quote it once again, but to do so opposite the comparable provision of United Gas Pipe Line Co.'s service agreement which was involved in the *Memphis* case:

PACIFIC NORTHWEST[10]	UNITED GAS[11]
Buyer agrees to pay Seller for all natural gas service rendered under the terms of this Agreement in accordance with Seller's Rate Schedule ..... as filed with the Federal Power Commission, and as such rate schedule may be amended or superseded from time to time. This agreement shall be subject to the provisions of such rate schedule and the General Terms and Conditions applicable thereto on file with the Federal Power Commission and effective from time to time, which by this reference are incorporated herein and made a part hereof.	All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule (the appropriate rate schedule designation is inserted here), or any effective superseding rate schedules on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

9. Petitioner refers only to the agreement for industrial gas. The identical provision is found in all of the service agreements—eight with petitioner, and seventy-odd with other customers, *supra* p. 5.

10. Appears in service agreement forms at R. 37 and 39 with the rate schedule designation left blank, and in each of the service agreements in the record with the rate schedule designation inserted. For Pacific Natural service agreements, see R. 311, 315, 319, 323, 327, 331, 335 and 345.

11. *Memphis,* 358 U.S. at 105.

The *Memphis* agreement was held to reserve the seller's right to make rate changes, and file them under § 4. There is not the slightest difference of substance between the *Memphis* service agreement, and that involved here.[12] Even without the authority of *Memphis,* the service agreements so clearly reserve the seller's right that no other result could reasonably follow. As the Supreme Court recently remarked in the *CATCO* case, the seller "may, unless otherwise bound by contract [citing *Mobile*], file new rate schedules with the Commission." *Atlantic Refining Co. v. PSC,* 360 U.S. 378, 389. In other words, under *Mobile* itself, even without the additional light shed by *Memphis,* the question is not whether seller has exacted from buyer a permission to exercise its rights under § 4; the question is only whether seller has promised that it will *not* exercise those rights, which are its normal rights in the absence of contrary agreement. *Mobile,* 350 U.S. at 343.

What we are to look for, then, in determining the nature of these service agreements, is not necessarily a provision *granting to* the seller the right to make and file rate schedule changes; that right exists as a matter of law *unless* it has been bargained away. *CATCO,* supra, 360 U.S. at 389; *Memphis,* 358 U.S. at 112-13. What we must look for in order to bring the case within *Mobile* is a commitment that the initial rate shall be the fixed and only rate for the entire term of the agreement.[13] Unless we find that, the arrangement is governed by *Memphis,* not *Mobile.*

These agreements have no such provision. Indeed, they contain no rates at all, initial or otherwise, but refer exclusively to the

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12. Pacific Northwest's agreement is stronger than that in *Memphis,* for there the agreement was only to pay in accordance with "any *effective* superseding rate schedules"; and it was strenuously argued that the word "effective" was meant to limit buyer's duty to pay to new schedules established after a § 5(a) proceeding. The Supreme Court's answer to this argument, 358 U.S. at 116, note 10, is discussed in some detail *infra,* pp. 35-36.

13. The *Mobile* contract was "a 10-year contract to supply gas for resale . . . at the equivalent of 10.7 cents per Mcf. . . ."

filed tariff for a statement of the rates. They go farther, and in clear language reserve to the seller, Pacific Northwest, the right to make and file rate schedule changes. The *Mobile* case had been decided by the Commission in December, 1953, 12 F.P.C. 1422, before Pacific Northwest entered into its first service agreement; it was reversed by the Court of Appeals, 215 F.2d 883, which in turn was affirmed by the Supreme Court on February 27, 1956, before Pacific Northwest's General Terms and Conditions were filed. It seems obvious that the agreements and the conditions were drafted with a careful eye to overcoming the *Mobile* result, by requiring the agreement of the buyer to pay in accordance with the designated schedule "as such rate schedule may be amended or superseded from time to time," and even more clearly by the provision in the General Terms and Conditions that

> "Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act . . . new rate schedules and changes in its existing effective Tariff . . .[14]"

In the face of these provisions, it would be idle to argue that a fixed rate contract was intended. And under the *Mobile* case, that is the end of the matter.

c. The "Right to Protest" Clause Does Not Detract from the Plain Meaning of the Price Clause.

Petitioner does not argue that a fixed-rate contract was intended—and thereby concedes the case. All it argues is that the last sentence of paragraph 10 of the General Terms and Conditions, R. 34, detracts from the right plainly given by the service agreements. This sentence reads, R. 34, "Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission." Petitioner contends that this

14. Petitioner concedes that the language which might be thought to qualify this right "creates wholly a subjective standard", and that but for the last sentence, the effect "would not be different legally than if the right had been unqualified." Pet. Br. 9.

sentence deprives Pacific Northwest of the right to file new industrial rate schedules. Pet. Br. 10-11.

This language cannot reasonably bear the meaning petitioner contends for; it means exactly what it says, nothing more: that buyer, like seller, is to have the usual right to appear before the Commission, and be heard with respect to the reasonableness and justness of the new rates. Since the paragraph has just stated that seller has not waived its rights under § 4 of the Gas Act, it is entirely reasonable to go on and say that buyer, too, shall not be estopped to appear, protest, and exercise its other rights under the Act, whatever they may be.

The right-to-protest clause is not written out in the service agreement; it is part of the general terms and conditions upon which Pacific Northwest offers service to its customers, and which Pacific Northwest has filed with the Commission as the law and the regulations require. 18 C.F.R. § 154.39. The service agreement, on the other hand, *is* a contract, and incorporates by reference the **applicable** provisions of the General Terms and Conditions.

The service agreement itself provides in the clearest terms that the seller does not relinquish its right to make and file new rate schedules, including industrial, by the clause binding the buyer to pay "as such rate schedule may be amended or superseded from time to time." *If* the "right to protest" clause—not written in the agreement itself but merely incorporated by reference as a part of eight pages of General Terms and Conditions—meant what petitioner says it means, it would be in flat conflict with the words of the agreement itself, and with its clear meaning and intent. In such a case, the rule of interpretation would apply, that where a document of general applicability is incorporated by reference into a contract, and there is conflict, the terms of the contract rather than those of the incorporated document control. *Daly v. Busk Tunnel Ry. Co.,* 129 Fed. 513; *Hill & Combs v. First Nat. Bank,* 139 F.2d 740; *Perry v. United States,* 146 F.2d 398.

But resort to that rule of construction need not be had in this case, for the service agreement itself provides that the General Terms and Conditions are incorporated into the service agreement only to the extent that they are "applicable thereto". R. 39. Clearly, if the "right to protest" clause in the General Terms and Conditions means what petitioner claims, it could not be "applicable" because it would deprive the gas company of a right explicitly granted by the service agreement itself, the right to amend and supersede its rate schedules from time to time.[15]

It is suggested, Pet. Br. 11, that unless the agreement is construed as petitioner would have it, it is invalid under general law. That, of course, is a matter which does not concern this Court; for all that is here for review is an order denying a motion to reject rate schedules in toto, and the question before this Court relates not to the enforceability of a private contract but to the jurisdiction of the Federal Power Commission to accept rate schedules for filing, and to proceed to exercise its concededly valid statutory functions with respect to them.

Even here, both petitioner's premise and its conclusion are wrong. These service agreements are, it is true, private sales contracts, but they are something more. They refer for prices to a tariff, filed as required by law, wherein the seller sets out the price to be paid not by a single buyer, but by all buyers

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15. Another relevant rule of construction is that contracts must be read in the light of the law existing when the contract is made. *Wood v. Lovett,* 313 U.S. 362, 370; *State of Washington v. Maricopa County,* 152 F.2d 556, 559, cert. denied 327 U.S. 799. The Natural Gas Act at the time these service agreements were made forbade the Commission to suspend an industrial rate. Before the first of the agreements here in question was made, it had been held that an industrial rate was not subject to refund. *Mobile Gas Service Corp.,* 12 F.P.C. 1422, 1424. All parties to the service agreements knew these things. Yet they agreed that seller should have the right to file new rates, and buyer should have the "right to protest", without making any distinction as to either right between industrial and other rates. Read in this light, the clause means simply this: that buyer shall have the right to protest all new rate schedules, industrial and other, *in accordance with existing law,* which does *not* provide for suspension of industrial rate schedules.

of the same kind of service. A contract binding a buyer to pay whatever rate seller may post, or list, or offer to purchasers generally, is valid.[16]

Petitioner concludes that application of the rule it contends for "would invalidate the provisions of the contract relating to change of price for industrial gas and leave the named rate fixed in the contract in effect . . ." Pet. Br. 11. But there is not, and never was, any "named rate fixed in the contract"; the only agreement there is, or ever was, as to price, is that buyer will pay seller for gas in accordance with seller's rate schedule on file with the Commission, "as such rate schedule may be amended or superseded from time to time." R. 39. The contract could not be "interpreted" to require seller to deliver gas at a rate that had been superseded; that would turn the service agreement into a fixed-rate contract, which nobody intended.

Petitioner's stated reason for its contention as to the meaning of the clause is, that although it as buyer has a right under the law to protest *all* rate schedules before the Commission, including industrial, its right to protest industrial rate schedules is less "real and substantial", Pet. Br. 10, than its right to protest

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16. Cities Service Gas Producing Co. v. FPC, 233 F.2d 726, cert. denied 352 U.S. 911 (prevailing field price for gas); Col-Tex Refining Co. v. Coffield & Guthrie, Inc., 196 F.2d 788 (posted price for crude oil); Shamrock Oil & Gas Corp. v. Coffee, 140 F.2d 409 (market price for gas); Buggs v. Ford Motor Co., 113 F.2d 618, cert. denied 311 U.S. 688 (list price for auto accessories and parts, subject to change by seller); Ken-Rad Corporation v. R. C. Bohannan, Inc., 80 F.2d 251 (list price for radio tubes, subject to change by seller); *a fortiori,* when the prices are subject to governmental review, Pfotzer v. United States, 176 F.2d 675 (agreement to pay price allowed by OPA); RFC v. United Distillers Product Corp., 113 F. Supp. 468, affirmed 204 F.2d 511 (same); Outlet Embroidery Co. v. Derwent Mills, 254 N.Y. 179, 172 N.E. 462 (prices subject to tariff revision). Moreover, petitioner's argument proves too much, for it would necessarily follow from its interpretation of the "right to protest" clause that the filing of nonindustrial rates would similarly be invalid unless the Commission *did* suspend them, subject to refund, so as to give the petitioner the *kind* of "right to protest" it claims it needs. Cf. *infra,* pp. 26-27. But not even petitioner claims that its agreement should be held to mean *that.*

nonindustrial rates; therefore, says petitioner, since the parties must have intended petitioner to have a "real and substantial" right to protest, seller must be deprived by "interpretation" of the right, plainly granted in the service agreement itself, to file new rates for industrial gas.

Petitioner confuses its contractual *rights* with the Commission's statutory *powers.*

Petitioner has the same *right* to protest industrial rates as it does all other rates; the right to remonstrate when new schedules are filed (as petitioner did here); to petition for leave to intervene (as petitioner did here); to participate in the hearing, if its petition is granted (as petitioner's was here), and the like. There is no distinction at all between industrial gas and other gas with respect to the existence of these *rights* to protest. There is only a distinction with respect to the Commission's statutory *powers:* a request by petitioner, in the exercise of its *right* to protest, that the Commission suspend an industrial rate, would necessarily fall on deaf ears since the power of the Commission to grant such a request does not exist. The parties could not grant petitioner a "real and substantial" right to protest to the Commission against *that;* any protest in that regard would have to be addressed to Congress.

But because the parties to the contract did not have, and knew that they did not have, any power to change the law or to dictate to the Commission how it should administer the law, petitioner's "right to protest" in all other respects is subject to the same infirmity, namely, that its protest may not result in the administrative action the petitioner desires. Petitioner assumes, without justification, that the contract conferred a right that the parties to the contract had no power to confer. Petitioner's protest will not be "real and substantial", in the sense in which petitioner uses those words, if the Commission waives thirty days' notice; or elects not to order a hearing; or orders a hearing without suspension. In any of these cases, the "*right* to protest" would

still exist, but it would turn out to be unavailing, just as a protest would if it demanded the suspension of an industrial rate schedule. But in these cases too, the contracting parties did not have, and knew when they made their contract that they did not have, any power to control the action of the Commission.

Petitioner's argument amounts to a demand that the Court give it what the contract did not and could not give. If petitioner's argument were correct, the words,

> Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission,

would have to be interpreted to mean,

> Seller shall not have the right to file new rate schedules for industrial gas.

Surely this is too much "interpretation" for a plain English sentence to bear.

Pacific Northwest cannot compel either the Commission to commence a § 5(a) proceeding, or its distributor-customers to agree to new rates, and although petitioner does *not* contend that the service agreement contemplates a fixed rate, petitioner's "interpretation" of the agreement would deprive Pacific Northwest of the *only* method available to it under the law and the agreement of initiating rate changes. Petitioner's argument would destroy one of Pacific Northwest's most valuable rights under the contract. But permitting Pacific Northwest to make and file rate changes, as the agreement provides it may, does not take away or in any manner affect petitioner's "right to protest". As stated by the Commission, R. 1411,

> "The right of protest reserved to the Buyer (Pacific Natural) is in no way impaired by acceptance of rate changes filed by the Seller (Pacific Northwest) and the terms of the agreement between the parties [are] carried out . . . Except for the lack of power of suspension by the Commission, the

increased rates for sales for industrial use only are governed by the same requirements, and the right of Pacific Northwest to file such increased rates is as clear as in the case of rates for other sales for resale."

Petitioner's present position as to the meaning of the "right to protest" clause is in sharp contrast to its conduct at all times until November 21, 1957 (when the erroneous *Memphis* decision was issued).[17] It is evident that the meaning petitioner now, *post litem motam,* ascribes to the "right to protest" clause is a meaning the clause was never intended to bear, and cannot reasonably be interpreted to bear. It is similar to the meaning the respondents

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17. Pacific Northwest's rate schedule changes, including those for industrial gas, were dated July 29, 1957 and filed August 6, 1957. R. 434, 436. August 7, the Commission invited comments from Pacific Northwest's customers, including petitioner. R. 690. August 19, 1957, petitioner exercised its "right to protest any such new rate schedules and changes before the Federal Power Commission", R. 34, by writing a letter to the Commission entitled "Objections in protest of Pacific Natural Gas Co. to rate increase filing of Pacific Northwest Pipeline Corporation." R. 751. It alleged that it had a number of contracts with industrial gas consumers, and that the rate increase was premature, and the rates were too high, but never did it allege that, either under the service agreement or under the law, Pacific Northwest was without right to file and make effective increases for industrial and other gas. It did not ask that the rate filing be rejected, and did not ask the Commission to prevent the industrial rates from becoming effective.

The very next day, August 20, 1957, petitioner entered into four new service agreements, each of them containing the identical rate-changing provisions that appeared in the prior agreements, without even alleging that Pacific Northwest had no right to file new rate schedules. R. 314, 322, 329, 334. Surely, if petitioner really believed that Pacific Northwest's filing of August 6, 1957 was a violation of the service agreement, it would not have entered anew into identically worded service agreements, without comment.

The industrial rates became effective September 1, 1957. R. 16. Still petitioner made no claim to the Commission that they were improperly filed, or improperly made effective, or should be rejected. Instead, it again exercised its "right to protest" by filing on September 10, 1957 a petition for leave to intervene, R. 822, again without alleging any contractual or legal barrier to Pacific Northwest's rate increase filing. It alleged only that "on August 6, 1957 Pacific Northwest filed notice of a change in its rates. This proposed increase will have a direct and significant effect on the consumers served by Pacific Natural." R. 823.

in the *Memphis* case sought to put upon the "effective superseding rate schedules" clause, and which the Supreme Court rejected. *Infra,* p. 20. Petitioner makes much of the fact that the *Memphis* service agreement contained no "right to protest" clause.[18] There is no indication that, had there been such a clause, it would have affected the result. And in fact, the service agreements of El Paso Natural Gas Company *did* contain such a "right to protest" clause, which read: ". . . provided, however, Buyer shall have the right to protest any such changes in rates and new rates or rate schedules before said Commission, and to exercise any other rights it may have with respect thereto under the Natural Gas Act. . . ." *El Paso Natural Gas Company,* 19 F.P.C. 154, at 156, note 5, affirmed sub nom. *Nevada Natural Gas Pipe Line Co. v. FPC,* 267 F.2d 405. The Commission, before the Supreme Court's decision in *Memphis,* held that El Paso nevertheless did reserve the right to file changes in all its rates, and the Court of Appeals held, 267 F.2d at 409,

> "The agreements before us, like those in the *Memphis* case, are typical . . . 'tariff-and-service arrangements'. . . . The 1955 agreements between El Paso Gas and its customers clearly disclose an intention that rates might be changed in accordance with Section 4(d) and 4(e) procedures. Under the rule in the *Memphis* opinion such provisions are valid and do not violate either the letter or the spirit of the Natural Gas Act."[19]

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18. Whether such a provision was contained in the General Terms and Conditions, as it is here, does not appear in any of the reported opinions in the *Memphis* case. If it was, no one paid any attention to it.

19. There were two sets of service agreements before the Court in that case, entered into in 1955 and 1957 respectively. The 1955 agreements did not, but the 1957 agreements did, contain the "right to protest" clause. The Court of Appeals was "of the opinion that the result would be the same under" either of the agreements. 267 F.2d at 408.

It will be noted that the 1957 clause quoted by the Commission at 19 F.P.C. 156, note 5, is not exactly the same as the one quoted by the Court at 267 F.2d 407. There is, however, no difference of substance in the meaning of the two "right to protest" clauses, and in fact the one quoted by the Commission is the correct one. See Joint Appendix, Nevada Natural Gas Pipeline Co. v. FPC, 5th Cir., Nos. 17074 etc., pp. 88, 116.

2. The Commission's Finding as to the Nature of the Service Agreements Is Supported by Substantial and Uncontradicted Evidence, and Relates to a Subject "Peculiarly Within the Area of the Commission's Special Competence".

When the petitioner in its motion to reject for the first time asserted the lack of right in Pacific Northwest to establish and file rate schedule changes, it made no assertion whatever as to the meaning of the service agreements or the intention of the parties; instead, it relied solely on the proposition that, as a matter of law under the Court of Appeals' *Memphis* decision, the Commission had no authority to do other than reject the new rates, and prohibit them from becoming effective. R. 1064-65.

The Commission, in passing upon this motion after the Supreme Court had righted the situation by its *Memphis* opinion, 358 U.S. 103, had before it not only the Supreme Court's two decisions in the *Mobile* and *Memphis* cases, but also a great body of evidence of which it could take official notice, to aid it in deciding whether the agreements of Pacific Northwest are of the one sort or the other.

First, of course, are the service agreements themselves, and their language. But in addition, the Commission had before it its intimate knowledge of the natural gas industry, and the understanding of the industry as to the meaning of such agreements. It knew, and was entitled to consider, the fact that all of Pacific Northwest's gas is sold under service agreements at filed rates, and that there are no special contracts, fixed-rate or otherwise, in this record. Petitioner had never claimed any infirmity in the Act, the Commission's jurisdiction, or the service agreements, or any lack of right in Pacific Northwest to file rate schedule changes and make them effective. In an informal protest and a formal petition for leave to intervene, no claim of contract violation had been made. The Commission was entitled to take into consideration that the vast majority of customers affected were making no such claim, and that petitioner's purchases of industrial gas will

bear only a small part of the total rate increase. Upon all of this evidence, the Commission concluded that these were *Memphis,* not *Mobile,* agreements.

Primarily, of course, the Commission based its decision on the language of the agreements themselves. R. 1372, 1410-11. The decision is one "peculiarly within the area of the Commission's special competence", as the Supreme Court held in the *Memphis* case. 358 U.S. at 114.

"The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Act § 19(b), 15 U.S.C. 717r(b). Here, the finding of the Commission as to the intention of the parties is not only substantially supported, but there is no contradictory evidence. We respectfully submit that the Commission's finding should be accepted by this Court, as it was by the Supreme Court in *Memphis.*

3. Petitioner's Constitutional Arguments Are Without Merit.

a. Analysis of Petitioner's Constitutional Objection.[20]

The only constitutional argument presented in petitioner's opening brief is that "to permit the unilateral filing of rates for industrial gas . . . under section 4(d) of the Natural Gas Act will permit the taking of petitioner's property without due process of law . . . ," Pet. Br. 12, because it might permit Pacific Northwest to exact from petitioner an "unlawful" rate, without the possibility of refund or reparation.

The constitutional objection, stated at Pet. Br. 4-5, lies in two areas: (1) in the failure of Congress to grant to the Commission the power of suspension and refund with respect to industrial

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20. At various places in the discussion of the constitutional question, we cite some cases dealing with validity of state statutes under the XIV Amendment, rather than of federal acts under the Fifth. The cases are equally applicable, since "the restraint imposed upon legislation by the due process clauses of the two amendments is the same." Heiner v. Donnan, 285 U.S. 312, 327; *cf.* FPC v. Natural Gas Pipeline Co., quoted *infra,* p. 35.

rates; and (2) in the failure of Congress to grant petitioner a right to restitution *if* the Commission later holds that the industrial rates which were established by Pacific Northwest were too high.

Note what petitioner does *not* claim. It does *not* claim that the Commission does not have, or constitutionally could not have, power to review the industrial rate changes under § 4(e) and determine their reasonableness, just as it does with respect to nonindustrial rates. It does *not* claim that there is as yet any finding, or even any evidence, that the rates are unjust or unreasonable; and of course that is a matter which is within the exclusive primary jurisdiction of the Commission. *Interstate Nat. Gas Co. v. Southern California Gas Co.,* 209 F.2d 380, 384. Petitioner has no constitutional objection to what may happen to the rates, including industrial rates, *after* the Commission has held its hearing and entered its order. Its objection goes *only* to the interim period between the filing of the changes and the entry of the order—the period during which the other rates may have been suspended, and the industrial rates have not.

Petitioner assumes that during this temporary period, petitioner's "property" is being "taken" under governmental compulsion, because, says petitioner, § 4(d) of the Act "permits" the unilateral filing of rates. Actually, however, § 4(d) "permits" the filing of no rates at all; it merely *prohibits* the establishment of *any* changed rates, whether by agreement or by action of the seller, without filing.

Before the passage of the Gas Act, under an agreement such as the ones here involved, the seller would have the right to change the rates offered to all purchasers, and the contract would be perfectly valid. *Supra,* pp. 15-16. No "taking"—indeed, no governmental action at all—would be involved. The legal duty of a buyer to pay increased rates would stem not from statute, but from contract.

These facts have *not* been changed by the Natural Gas Act. The right of a seller of gas to alter its rates is not "under section 4(d) of the Natural Gas Act" but under its contract. The Act has not altered the status of contracts one whit. The Supreme Court made this clear in the *Mobile* case:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts."[21]
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> ". . . The Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."[22]
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> "On its face, . . . § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract. . . . The section says only that a change *cannot* be made without the proper notice to the Commission. . . ."[23]
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> "The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies."[24]
>
> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."[25]

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21. 350 U.S. at 338.
22. Id. at 339.
23. Ibid.
24. Id. at 341.
25. Id. at 343.

". . . The Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time. . . ."[26]

Thus, the duty of petitioner to pay the rates established by Pacific Northwest from time to time is "unaffected" by the Natural Gas Act, is neither granted nor defined thereby, and the only relation that it bears to the Act of Congress is that Congress declined to abrogate it. No authority is known to or found by us, and none is cited by petitioner, which holds or even intimates that the failure or refusal of Congress to regulate voluntary private transactions, or a Congressional decision to regulate such transactions in part only, constitutes a denial of due process; the Supreme Court has answered such arguments by saying that ". . . if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress has exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." *United States v. Hill,* 248 U.S. 420, 426, quoting *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 331; cf. *Roschen v. Ward,* 279 U.S. 337, 339 ("A statute is not invalid under the Constitution because it might have gone farther than it did. . . .")

Next, petitioner assumes that if the Commission upon review of rate changes filed by a natural gas company fixes rates lower than those filed, it somehow becomes established that the rates originally filed were unjust, unreasonable, and unlawful.[27] This assumption is doubly inaccurate.

It is true, of course, that *after* the Commission has fixed reasonable rates and ordered them filed, it would be a violation of the Act—"unlawful"—to charge any other rates. *Infra,* p. 28. It by no means follows that all other rates are unlawful in the sense that they are unjust or unreasonable. Reasonableness in

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26. Ibid.

27. This assumption is nowhere specifically stated, but is made at Pet. Br. 4-5, 9, 10, 13-15, 16, 18, 19.

rate-making is not a pinpoint but a zone. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 251. The Commission may pinpoint the actual rates at any level within the zone of reasonableness. It may, but need not, allow the natural gas company something more than the lowest reasonable rate. It need not, but it may, set rates at the very "brink of confiscation." *City of Detroit v. FPC,* 230 F.2d 810, 815, cert. denied 352 U.S. 829.

It does not, therefore, follow that when the Commission lowers filed rates, the rates were unlawful when filed. They may well have been within the zone of reasonableness. The Commission would still have power to order them decreased, since § 4(e) gives it power to make "such orders with reference thereto as would be proper in a proceeding initiated after [the rates] had become effective," and § 5(a) gives it power to lower any but "the lowest reasonable rates."

Petitioner's entire claim — which is not that the rates are unreasonable, but only that they "may be" so — rests on the language of the Commission's suspension order. Pet. Br. 12-13, 14. Petitioner terms this language a "finding" of the Commission, and would have the Court infer that it is thereby authoritatively established that something may be wrong with the new rates. Nothing could be farther from the fact. The Commission always includes such language in suspension orders, but it has specifically repudiated the idea that suspension of a rate increase implies a disapproval of it, or in any way suggests that it will not eventually be allowed in part or in whole. *Virginia State Corp. Com'n,* 9 P.U.R. 3d 281, at 286.

When a natural gas company files with the Commission a new rate schedule under § 4(d), the Commission may do any one of four things:

(1) It may waive the requirement of thirty days' notice, and permit the new rate schedule to become effective immediately.

(2) The Commission may do nothing, in which case the new

rate schedule would become effective at the end of the thirty days' notice period, as specified by the natural gas company.

(3) It may, without suspending the rate schedules, decide to hold a hearing upon the question whether the new rates are just and reasonable.[28]

(4) It may decide to hold a hearing on the lawfulness of the new rate, and suspend the operation of the new rate schedule for any period from one day up to five months.

The choice of these alternatives is purely discretionary with the Commission. *Virginia State Corp. Com'n,* 9 P.U.R. 3d 282-286. *If* it adopts the fourth, it may also order that when the new rate goes into effect (as it must be permitted to do when the suspension period, whether five months or less, expires) the collection of the increase shall be subject to refund to the extent it is later found by the Commission not justified. However, the only increase with respect to which a refund can be ordered is one which has been suspended. § 4(e); *Mobile Gas Service Corp.,* 12 F.P.C. 1422, 1424. The Commission has no power to suspend an *initial* rate; it can only suspend rate *changes,* § 4(e), and initial rates are reviewable only under § 5(a). See *Atlantic Refining Co. v. PSC,* 360 U.S. 378, 392; *Bel Oil Corp. v. FPC,* 255 F.2d 548, 554, cert. denied, 358 U.S. 804. So in the case of every initial rate, and also in the case of rate changes if notice is waived (alternative 1); or if the Commission takes no action on the natural gas company's notice of rate increase (alternative 2), or even if the Commission decides to hold a hearing without suspension (alternative 3), there is no possibility of its ordering a refund, even should the Commission later hold that the rates being collected were not just and reasonable, and therefore (prospectively) "unlawful".

The Commission may, and often does, adopt one of the first three alternatives *without* finding the new rate just and reasonable.

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28. In this event, the rate schedules would become effective as specified by the natural gas company, and the effect of such an order would be no different than if the order were entered under § 5(a).

The Commission has held, and its regulations provide, that the acceptance of a schedule for filing is not an approval of the rate. *Home Gas Co.,* 2 F.P.C. 402, 409; *City of Cleveland v. Hope Nat. Gas Co.,* 3 F.P.C. 150, 187; *Dorchester Corp.,* 11 P.U.R. 3d 189, 191; 18 C.F.R. 154.23, 154.101. Thus, either an initial rate or a new rate schedule may become effective without suspension, without possibility of refund, and subject to a later finding that it is "unlawful"; yet **it is not unlawful until such a finding is made.** Far from it: the rate set forth in a filed and effective schedule is not only *a* lawful rate, but *the only lawful rate.* The buyer has no right to service by paying, and the seller has no right to demand or receive, any rate either less or more than the filed rate.[29] *The parties "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms."[30] Not only does the natural gas company commit no unlawful act by collecting the filed rate, but it would be unlawful for it not to do so. Petitioner's "property" is not "taken" when it pays only that which it lawfully owes.

After contending that the new rates "may be" unreasonable—a contention unsupported by findings or even evidence, entirely hypothetical, and not before this Court in any event—petitioner asserts that it has been deprived by the Natural Gas Act of a right to recover "unlawful" payments, and that no alternative remedy has been provided.

It is clear from *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, cited by petitioner, that the Natural Gas Act (the provisions of which are wholly analogous

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29. Subject, of course, to the *Mobile* exception: that the seller has not contracted away its right to file new rate schedules.

30. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (under § 205(a) of the Power Act, emphasis ours); Hope Natural Gas Co. v. FPC, 134 F.2d 287, 311 (under the Gas Act), reversed on other grounds, 320 U.S. 591.

to the Power Act in this regard) did *not* deprive buyers of a right to reparation for unreasonable rates, but rather that *no such right,* cognizable by the Federal Courts, *exists.* The dissenters argued that the Federal Power Act had created a right to a reasonable rate, for which the courts should provide a remedy. There was no suggestion in the opinion of the Court, or in the dissent, of any right to a reasonable rate other than one which might have been, *but was not,* created by Congress.[31]

Assuming, however, that the purchaser of natural gas had some common law remedy to obtain reparations in the event he paid a seller an exorbitant price for his product, it would not offend due process for Congress to abolish that remedy unless Congress thereby deprived petitioner of existing property or a right already vested. Indeed, the authorities cited by petitioner which are in point at all bear this out.[32] Petitioner has not alleged that the Natural Gas Act deprived it of any of its property at the time of its passage. The record shows that all of the contracts in question were made after 1938. If petitioner wished to protect itself against increases in gas rates, it could have done so by contract. *United Gas Co. v. Memphis Gas Div.*, 358 U.S. 103. The Act deprived it of nothing.[33]

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31. T.I.M.E. v. United States, 359 U.S. 464, also relied upon by petitioner, did hold that *if* there had been a common law right to obtain reparations, it did not survive the enactment of the Motor Carrier Act. There is no suggestion that its abolition would raise any constitutional doubts. The majority of the Court questioned whether there had ever been a common law right to reparations for mere excessiveness of rates (as opposed to discrimination or fraud). In any event, no such right exists today, under the Motor Carrier Act, the Natural Gas Act, or the Federal Power Act.

32. Constitutional Law, 12 Am. Jur. 279, § 582, and Constitutional Law, 16A C.J.S. § 614, both cite cases which deal with the deprivation of vested rights by the abolition of judicial remedies.

33. It has in any event been held that the Act may validly be applied so as to alter rights under pre-1938 contracts. J. M. Huber Corp. v. FPC, 236 F.2d 550, 558, cert. denied 352 U.S. 971; Colorado Interstate Gas Co. v. FPC, 142 F.2d 943, 953, affirmed as to other issues, 324 U.S. 581; Mississippi River Fuel Corp. v. FPC, 121 F.2d 159, 163.

The fact is that Congress, by prescribing its system of regulation for the natural gas industry, has not deprived plaintiff of any judicial remedy it may have had to obtain reparations. What Congress *has* done is to change the substantive law. By declining to provide for a right to reparations, it has made clear that it intended no such right to exist.[34] The right of Congress, without violating the Constitution to make changes in the substantive law, cannot be doubted:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of the municipal law, and is no more sacred than any other . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances."[35]

The present state of constitutional law with respect to this subject was well summed up by the Court of Appeals, Sixth Circuit, in *NLRB v. Budd Mfg. Co.,* 169 F.2d 571, 578-79, cert. denied 335 U.S. 908, in which the question was whether supervisors were denied due process when the 1947 Labor Management Relations Act took away their federally-protected collective bargaining rights:

> "It is equally well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable . . . . There are numerous instances of valid legislation which has

34. T.I.M.E. Inc. v. United States, 359 U.S. 464; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246.

35. Munn v. Illinois, 94 U.S. 113, 134; Second Employers' Liability Cases, 223 U.S. 1, 50; cf. Battaglia v. General Motors, 169 F.2d 254, cert. denied 335 U.S. 887.

classified and exempted certain types of employees from the provisions of the legislation being enacted.

"Whether it is desirable or undesirable, as a matter of policy, for foremen to organize and be classified as employees, is for Congress, not the Court, to determine.

"We do not agree with the further contention that the supervisory employees have been deprived of a property right in violation of the Fifth Amendment . . . There is no vested right in individuals to have the rules of law remain unchanged for their benefit . . . The Amendment is not directed against any named individuals or easily ascertainable members of a group. It expresses a policy, applicable to all within a general classification, not found to be either arbitrary or invalid; it is remedial public legislation rather than punitive to the individual. Congress was not interested in the activities of supervisors as individuals."

Both of the features of the Natural Gas Act complained of by petitioner—lack of Commission power to order reparations, and lack of Commission power to suspend industrial rates—were deliberately so included in the Act by Congress.[36] Basically, its

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36. The Natural Gas Act, regulating interstate wholesales of gas, is based on Part II of the Federal Power Act, adopted in 1935, which regulates interstate wholesales of electricity. 16 U.S.C. 824d, 824e. The draftsmen of the Power Act had this to say about reparations, Sen. Rep. 621, 74th Cong. 1st Sess. 20:

"Section 205(b), transferred from section 202(c) of the original bill, has been modified. . . . The provisions defining with particularity the power of the Commission to investigate single rates and to fix standards of service . . . and the section authorizing the issuance of reparation orders . . . have been eliminated. They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions."

In the drafting of the Gas Act, several of the bills completely exempted industrial gas from regulation. See, e.g., § 1(b) of H.R. 4008, 75th Cong., 1st Sess. It was recognized that industrial gas competed with other fuels, and no regulation was thought necessary. H.R. Comm. on Interstate and Foreign Commerce, Hearings on H. R. 11662, 74th Cong. 2d Sess. 17, 95. The bill which became the Act covered resales for industrial use, see H.R. 6586, 75th Cong. 1st Sess., but was amended to include the proviso in § 4(e) exempting industrial rates from suspension. Industrial users

reasons for both denials of power come down to this: the Act is not primarily designed as a distributor or industry-protection measure; if gas distributors and industrial users really need protection against rate increases, they can get it by contract; and if no contract can be agreed upon, other fuels are available to industry.

The difficulties and expenses attendant upon imperfection and lag in the regulatory process are not borne exclusively by distributors or industry, but are shared to an even greater extent by the pipelines. The pipelines are subjected by § 4 and § 5 to restrictions and disabilities similar to those § 4(e) places on industrial users. The pipeline cannot have any relief in a § 4 proceeding, where its new rates have been suspended, even though the old rates were too low during the suspension period; a pipeline cannot initiate a § 5 proceeding at all as a matter of right, and cannot get retroactive relief under either section. It has been held that there is no constitutional objection to these Congressional limitations on pipelines' rights. *Hope Natural Gas Co. v. FPC,* 196 F.2d 803, 808-09; cf. *State Corp. Com'n v. FPC,* 215 F.2d 176, 183.

If in the interests of balancing the hardships of regulatory lag to which the pipeline is subject, Congress in its wisdom decided to require the industrial user of gas to share with the pipeline companies the burden of protecting the interests of the general public—a burden the industrial user can pass on to its own customers—it is manifestly reasonable for Congress to do so. The decision is for Congress to make, *NLRB v. Budd Mfg. Co., supra,* and the courts will not strike down a system of federal regulation unless it is so patently unreasonable as to be oppressive

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were left free to protect themselves by contract, as in the *Mobile* case. The distributor could protect itself in either of two ways: if it had a fixed-rate contract with the industrial customer, it could protect itself by a fixed-rate contract with the pipeline, as in *Mobile;* if it had a variable-rate contract with the pipeline, it could protect itself by escalation clauses in the industrial customer contracts, as in the *Memphis* case and this case.

and arbitrary. *Yakus v. United States,* 321 U.S. 414; *Carolene Products Co. v. United States,* 323 U.S. 18; *Wickard v. Filburn,* 317 U.S. 111; *Sunshine Coal Co. v. Adkins,* 310 U.S. 381; *United States v. Darby,* 312 U.S. 100; *Steward Machine Co. v. Davis,* 301 U.S. 548.

Petitioner contends that it is "as fully entitled to the protection of the Fifth Amendment as is" Pacific Northwest, since both are public utilities. Pet. Br. 17. The fact is, however, that petitioner sought and obtained exemption from the Natural Gas Act and is entirely free of federal regulation. *Pacific Natural Gas Co.,* 17 F.P.C. 638. Since the Fifth Amendment controls only federal action, petitioner's argument is irrelevant.[37]

The Fifth Amendment does not guarantee petitioner a profit in its business any more than it guarantees such a profit to Pacific Northwest. *Alaska Fish Co. v. Smith,* 255 U.S. 44, 48. Consequently the fact—even if it were a fact—that petitioner might be required to absorb the increase of Pacific Northwest's rates, though important insofar as petitioner's standing to challenge the order is concerned (*Natural Gas Pipeline Co. v. FPC,* 253 F.2d 3), is of no relevance to the alleged infringement of its constitutional rights by the Natural Gas Act.

The relevant fact is that petitioner has consented to the rate increases by contract and cannot complain. There is no constitutional objection to the enforcement of obligations created by contract, even though the contract fails to reserve what otherwise would be a constitutional right. *Beall v. New Mexico,* 16 Wall. 535, 539-40; *United States v. American Fruit Product Corp.,* 238 U.S. 140, 142; cf. *Hickok Oil Corp. v. Fleming,* 161 F.2d 199, 202.

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37. For this reason, we agree that it does not serve petitioner's "purpose in referring to the many decisions of the Supreme Court of the United States which are cited to support," Pet. Br. 18, the text quoted from American Jurisprudence. Without exception they set forth the minimum requirements of due process to which the *regulated utility in question* is entitled; but here petitioner's rights, if any, are those of any other purchaser of gas, not of a utility.

Even were petitioner, with respect to this case, in the position of a regulated utility, the same rule would apply. When rates are established by contract, no constitutional right is violated by enforcement of the contract; the question whether the rate is "confiscatory" is immaterial. *Southern Utilities Co. v. Palatka,* 268 U.S. 232; *Milwaukee Elec. Ry. Co. v. Milwaukee,* 252 U.S. 100, 105; see *Southern Iowa Elec. Co. v. Chariton,* 255 U.S. 539, at 542. "A public utility cannot, because of loss, escape obligations voluntarily assumed." *Fort Smith Traction Co. v. Bourland,* 267 U.S. 330, 332. A case very close on its facts to this one is *Arkansas Gas Co. v. Railroad Com'n,* 261 U.S. 379, in which the Legislature empowered the Commission to fix rates, but specifically withheld power to alter existing rate contracts, even though unjust and unreasonable. A unanimous Supreme Court had no difficulty overruling the due process objection.

The constitutional principle goes even further: there would be no violation of due process if governmental action required petitioner to pay a rate *higher* than that fixed in a contract. *Midland Realty Co. v. Kansas City Power Co.,* 300 U.S. 109. This being true, there can be no valid objection to enforcement of the contract.

Petitioner's fear that unless its claims are upheld, the seller can file repeated and successive rate increases, which the Commission will have no power to prevent, is a chimera. The Commission has already shown that it knows how to deal with that kind of tactic, by rejecting out of hand rate increases that are patently unjustified, or which depend for their reasonableness upon issues already decided against the seller; and the Commission in so doing has been upheld by the Courts of Appeals. *Northern Natural Gas Co.,* 11 F.P.C. 278, affirmed sub nom. *State Corp. Com'n v. FPC,* 206 F.2d 690, 715-16, 723; s.c. on further proceedings, 215 F.2d 176; *Panhandle Eastern Pipe Line Co. v. FPC,* 236 F.2d 606.

b. The Constitutionality of the Natural Gas Act Is Thoroughly Settled.

The Natural Gas Act is now more than twenty years old and has at all times contained precisely the provisions of which petitioner complains. Constitutional attack on the Act came shortly after its passage, the principal case upholding it being *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, where the Court said, p. 582,

> "It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."

It is true that no one has yet been so temerarious as to make the precise constitutional argument which is here made by petitioner. Nevertheless, the constitutionality of the Act has been too often decided to leave room for doubt that it is valid in all its parts. *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575; *Mississippi River Fuel Corp. v. FPC,* 121 F.2d 159; *Thatcher v. Tennessee Gas Transmission Co.,* 180 F.2d 644, cert. denied 340 U.S. 829; *Williams v. Transcontinental Gas Pipe Line Corp.,* 89 F. Supp. 485. In October Term, 1944, the Supreme Court refused to hear a contention that the Act violated due process in overriding pre-1938 contracts, limiting its grant of certiorari in *Colorado Interstate* to other questions presented, 323 U.S. 700.

The same arguments made here (although without the constitutional overtones petitioner gives them) were rather summarily rejected by the Supreme Court in the *Memphis* case. Indeed, the brief for the respondents in that case went into great detail in arguing the facts of *this* very case, in an attempt to show that it is unreasonable to permit nonsuspendible and nonrefundable

increases in industrial rates to be made and filed by natural gas companies.[38] The Supreme Court answered,

> "the force of respondents' contention is wholly destroyed by the fact that it appears that the buyer-signatories to the agreements are entitled by contract with their customers to pass on any rate increases effected by United."[39]

And so here, the force of petitioner's contentions is destroyed by the admitted fact that it does not bear any industrial rate increases but passes them on to its customers. *Infra,* pp. 37-38.

c. The Constitutional Claims Are Irrelevant.

The judicial policy of refusal to decide constitutional issues in the absence of "strict necessity" is well-known and thoroughly

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38. Brief for Memphis Light, Gas & Water Div., et al., pp. 69-71, United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., Nos. 23, 25, and 26, October Term, 1958, 358 U.S. 103.

39. The entire answer is as follows, 358 U.S. at 115-16, note 10:
"Respondents argue that the 'effective superseding rate' clause of the agreements must be read as referring only to superseding rates established after a § 5(a) proceeding, because it would be unreasonable to find that the buyer-signatories to the agreements had intended to authorize United to change its 'industrial' rates by a § 4(d) filing in light of the fact that such rates are not subject to suspension and refund under the statute. Apart from the circumstances that (1) United's 'industrial' sales under these agreements appear to have been a relatively minor factor; (2) the clause would be entirely superfluous if construed as respondents would have it, since as a matter of law rate changes ordered by the Commission after a § 5(a) proceeding would have been incorporated into the agreements, *Northern Pacific R. Co. v. St. Paul & Tacoma Lumber Co.,* 4 F.2d 359 (C.A. 9th Cir. 1925), appeal dismissed, 269 U.S. 535; *Market Street R. Co. v. Pacific Gas & Electric Co.,* 6 F.2d 633 (D.C. N.D. Cal. 1925), appeal dismissed, 271 U.S. 691; and (3) the 'industrial' rates of United have consistently been below its other rates, the force of respondents' contention is wholly destroyed by the fact that it appears that the buyer-signatories to the agreements are entitled by contract with their customers to pass on any rate increases effected by United. Under these circumstances it can hardly be said to be inconceivable, or even unlikely, that the buyers would have been willing to authorize United to change its 'going' rates to them under § 4(d)."

established, and we do not stop to argue it.[40] One of the branches of this rule is that the constitutionality of a statute will not be decided "upon the complaint of one who fails to show that he is injured by its operation." *Coffman v. Breeze Corporations,* 323 U.S. 316, 324-25; *Morf v. Bingaman,* 298 U.S. 407, 413; *Plymouth Coal Co. v. Pennsylvania,* 232 U.S. 531, 544-45.

Petitioner ignores this rule, contending only that it has standing to petition for review under § 19(b) of the Act, and relying on *Natural Gas Pipeline Co. v. FPC,* 253 F.2d 3. Pet. Br. 19.

But the question whether one has standing to petition for review under the Act, and whether he has standing to allege the unconstitutionality of the Act, are very different questions. As the case cited by petitioner shows, one may be said to be "aggrieved" by administrative action, and therefore be permitted to seek judicial review of it, although he is affected only in oblique and intangible ways, and is in fact asserting the interests, not of himself, but of others—even of the "public". See *Scripps-Howard Radio v. FCC,* 316 U.S. 4, 14; *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 476-77.

Not so, however, in constitutional litigation. There the litigant must show that he, himself, is the injured party. In point is *Newark Natural Gas Co. v. Newark,* 242 U.S. 405, holding that a gas distributing company could not complain of an ordinance fixing resale rates for gas, where the purchase price of the gas was fixed by contract at a percentage of the resale rate; for the distributor "cannot be heard here to assert the constitutional rights of" its vendor. See also *Tileston v. Ullman,* 318 U.S. 44, and cases cited.

Petitioner all but concedes that all rate increases established by Pacific Northwest have been passed on to petitioner's customers. Pet. Br. 18. It does not deny, in any case, that that is the

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40. Rescue Army v. Municipal Court, 331 U.S. 549, 568-75; Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136-37; Spector Motor Service v. McLaughlin, 323 U.S. 101, 105.

fact, and therefore "fails to show that [it] is injured" by the alleged unconstitutional action. Indeed, petitioner could hardly deny that it has passed on all of the rate increases, since the record contains its statements that it fully intended to do so; it refers, R. 752, to "the fact that Pacific Natural Gas Co. . . . [is] unable to absorb the proposed rate increase and will be required to pass it on to its customer consumers . . ." Again, it concedes, R. 753, that all of its industrial contracts except one contain escalation provisions, and in the case of that one, it will seek an increase from the Washington Public Service Commission. And its customers themselves—all of them who refer to the subject at all—contend that their contracts with petitioner "provide that increased gas costs suffered by the distributor are to be passed on to the purchasers." R. 1257.[41]

Petitioner seeks to avoid the application of this settled rule on the basis that it is "contrary to fundamental right and justice" to require petitioner to impose "unlawful rates" upon its customers. Pet. Br. 18. But such an argument assumes that the rates *are* "unlawful." There is nothing in the record, or in the brief for that matter, to suggest that the rates are unreasonable, or will ever be held unlawful; and as we have shown, unless and until they are so held, they are not merely lawful rates, but the *only* lawful rates. *Supra,* p. 28. There is nothing contrary to right or justice in recognizing that petitioner is suffering no harm by reason of the facts it alleges, and in requiring that the claims of unconstitutionality be presented, if at all, by those who can show injury to themselves. On the contrary, a firmly-embedded policy of judicial restraint demands that until a petitioner appears who does show injury to himself, no claim of violation of the Constitution be entertained.

Application of the rule of "strict necessity" for decision of constitutional questions means, of course, that no Federal Court

41. Two of the ten parties to the cited document alleged they are customers of petitioner. R. 1260, 1264.

should reach a constitutional issue unless the case cannot be disposed of in any other way. E.g., *Alma Motor Co. v. Timken-Detroit Axle Co.,* 329 U.S. 129, 136-37. Here, however, decision of the constitutional questions raised by petitioner could not affect the result *at all,* for even if they could somehow be decided in petitioner's favor, it would not follow that the order under review should be reversed, or that petitioner could be granted the relief it seeks.

The order sought to be reviewed is simply one which denies a motion by the petitioner to reject Pacific Northwest's changed rate schedules. It fixes no rates and denies no reparations. The rate schedules involve several kinds of service, domestic and commercial as well as industrial. They alter the rates for service not only to this petitioner, but to all of Pacific Northwest's customers who take the particular service, and there are many such customers under each rate schedule. They apply not only pending the Commission's hearing and order, but for the indefinite future unless changed pursuant to law.

The contractual provisions permitting Pacific Northwest to make and file new rate schedules are valid and enforceable. *Memphis,* 358 U.S. 103. Petitioner's constitutional objections go only to the right of Pacific Northwest, pending Commission review, to collect increases in rates for industrial gas alone, for a temporary period, from the present petitioner.

The constitutional claims do not go to the validity of the *contract,* since a contract can hardly be unconstitutional. But even if the rate-changing term of the contract were somehow invalid, the result would simply be a binding contract without any price term, but subject to the Act and to Commission regulation. In that case, there being nothing in the service agreement which sets a fixed rate, Pacific Northwest would have the usual right of every natural gas company not bound to a fixed rate, to make and file new rate schedules. *Mobile,* 350 U.S. 323; *Memphis,* 358 U.S. 103. A determination that the contract was invalid would in no

way affect the rights of the parties, and certainly would not affect the powers of the Commission.

As before shown, the contention that the Act is unconstitutional has two negative aspects: it goes not to the validity of anything Congress has done, but only to the failure of Congress to regulate to the limit of its power; and it does not go to the validity of the rate increase filing as the basis for permanent rates, but only to their validity in the interim period between filing and an order after hearing. Pet. Br. 4-5. There is thus no real basis whatever for any contention that this Court could or should order the Commission to *reject* the new rates *in toto*. The entire filing cannot be rejected on the supposition that it may turn out to be unjustified in part. *Mississippi River Fuel Corp. v. FPC,* 202 F.2d 899, 902. The Commission clearly has jurisdiction to review the rates and continue them in effect after hearing if they are found just and reasonable, and no constitutional objection to its doing so has been suggested. The objection is merely that it failed to suspend them in the meanwhile.

But the reason that the Commission did not suspend the industrial rates is that the Congress specifically withheld from the Commission the power to do so. § 4(e), *proviso.* It would seem clear that this Court could not grant to the Commission a power of refund and suspension that the Congress has deliberately withheld. And yet, that is all the petitioner really asks, or has even the slightest color of claim to ask the Court to do.[42] On the other

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42. As noted above, an initial rate cannot be suspended, and the exercise of the power to suspend nonindustrial rates is only one of four options the Commission has when rate changes are filed. *Supra,* p. 26. None of the other three options involves any suspension, and when there is no suspension there can be no refund. It may also be noted that the Commission cannot award retrospective rates to a natural gas company in a § 5(a) proceeding where the rates turn out to be too low. A holding that a total lack of power to suspend industrial rates is unconstitutional would seem also to require holdings:

(a) That it is unconstitutional to fail to suspend initial rates;

(b) That when rate changes are filed, it is unconstitutional for the Commission to waive notice as the Act expressly permits;

hand, invalidity alleged to lie in the failure of Congress to grant a right to restitution of payments made during the period between effectiveness of rate changes and the date of an order fixing rates, is a subject not before the Court. There is no finding that any rate is unjust or unreasonable, no showing that petitioner is in any way harmed. Only a hypothetical case is presented. *United States v. Harriss,* 347 U.S. 612, 617; *United States v. Petrillo,* 332 U.S. 1, 11-12. Petitioner's complaint necessarily rests upon the assumption that the filed rate for industrial gas, which the agreement currently requires petitioner to pay, will later be held unreasonable. Only the Commission can decide that question in the first instance, see *Montana-Dakota,* 341 U.S. 246, 251, and it has not yet held a hearing or reached a decision. It may well hold that the filed rates are just, reasonable and lawful. If it does, petitioner's complaint vanishes. The Court could not very well grant petitioner relief here upon the assumption, unsupported by findings or even evidence, that the Commission will outlaw the filed rate. So to do would necessarily intrude upon the Commission's primary jurisdiction to decide "issues which, under a regulatory scheme, have been placed within the special competence of an administrative body," *United States v. Western Pacific R. Co.,* 352 U.S. 59, 64, as well as requiring an advisory opinion upon a constitutional question not ripe for adjudication, *United States v. Harriss,* supra. Even if the Court were somehow brought to agree with petitioner's Constitutional arguments, the result could not

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(c) That it is unconstitutional for the Commission to do nothing when rate changes are filed, as the Act tacitly permits;

(d) That it is unconstitutional for the Commission to order a hearing without suspension or refund;

(e) That it is unconstitutional to fail to award the seller company suspension, refunds and reparations in § 5(a) proceedings, but see *Hope Natural Gas Co. v. FPC,* 196 F.2d 803.

This, of course, would leave very little of §§ 4 and 5 standing, would cut out "the heart of the new regulatory system", *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 611, and thereby destroy what both Congress and the Supreme Court have considered to be a "comprehensive and effective regulatory scheme." *Atlantic Refining Co. v. PSC,* 360 U.S. 378, 392.

rationally be either a judicial grant of power to the Commission to fix or order reparations, or a judgment that the Commission be stripped of all of its jurisdiction conferred by Congress over industrial rates, a portion of which must be conceded to be valid. *Colorado Interstate Gas Co. v. FPC,* 324 U.S. 581, 595-96.

Thus, petitioner's constitutional claims present to this Court no case with respect to which the Court could properly grant any relief, even if the constitutional objections were sound. As shown above, if the constitutional claims are reached, they will be found to be utterly lacking in substance or merit.

CONCLUSION

Petitioner's claim as to the meaning of the service agreements—unsupported by evidence and unshared by any other of several dozen parties to the same agreements—is foreclosed by the uncontradicted findings of the Commission, and by the *Memphis* case. That is really all there is to petitioner's case. Its constitutional claims are both irrelevant and baseless. The order of the Commission should be affirmed.

Respectfully submitted,

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